

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE:

OVERLAP, INC.,

Respondent-Appellant

v.

A. G. EDWARDS & SONS, INC.,

Appellant-Respondent

DOCKET NUMBER WD69700 & WD69734

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

DATE: June 15, 2010

Appeal From:

Circuit Court of Jackson County, MO
The Honorable Roger Martin Prokes, Judge

Appellate Judges:

Division One: James Edward Welsh, P.J., Victor C. Howard and Alok Ahuja, JJ.

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MISSOURI APPELLATE COURT OPINION SUMMARY
MISSOURI COURT OF APPEALS, WESTERN DISTRICT

OVERLAP, INC., Respondent- Appellant-, v.
A. G. EDWARDS & SONS, INC., Appellant- Respondent

WD69700 & WD69734

Jackson County

Before Division One Judges: James Edward Welsh, P.J., Victor C. Howard, and Alok Ahuja, JJ.

A.G. Edwards & Sons, Inc., appeals the circuit court's judgment awarding Overlap, Inc., compensatory and punitive damages in the amount of \$4.1 million on Overlap's claims for breach of a mutual fund analysis software license agreements, fraud, and negligent misrepresentation. On appeal, A.G. Edwards & Sons raises eleven points. In response to A.G. Edwards & Sons' appeal, Overlap filed a contingent cross-appeal asserting three issues. A.G. Edwards & Son's point concerning intentional juror nondisclosure is dispositive of this appeal.

REVERSED AND REMANDED

Division One holds:

(1) Because Juror Hillerman's failure to disclose that he had been a party to a lawsuit was intentional, the circuit court erred in denying A.G. Edwards & Sons' motion for new trial. Under the case law at the time of trial, A.G. Edwards & Son's intentional juror nondisclosure claim was timely raised. We acknowledge that the Missouri Supreme Court recently noted in *Johnson v. McCullough*, 306 S.W.3d 551 (Mo. banc 2010), that, in the future to preserve the issue of a juror's nondisclosure, a party must use reasonable efforts to examine the litigation history on Case.net of those jurors selected but not empanelled and present to the circuit court any relevant information prior to trial. The *Johnson* decision, however, applies prospectively only. At the time of the trial in this case, the Missouri Supreme Court's decision in *Brines by Harlan v. Cibis*, 882 S.W.2d 138 (Mo. banc 1994), was the law in Missouri. In *Brines*, the Missouri Supreme Court held that a litigant had no duty to conduct an investigation concerning a juror's nondisclosure before jury deliberations. Because *Brines* was the law in Missouri at the time of the trial in this case, the circuit court was constitutionally bound to follow it. The circuit court erred in relying on *dictum* of this court in *McBurney v. Cameron*, 248 S.W.3d 36 (Mo. App. 2008) (en banc), and in concluding that A.G. Edwards & Sons should have conducted an investigation during trial and raised its juror nondisclosure concerns before the case was submitted to the jury.

(2) Because the statutes of limitation issue will continue to be an issue on retrial, we also address A.G. Edwards & Sons' contention that all of Overlap's claims are barred by five-year statutes of limitation. Overlap's amendment naming A.G. Edwards & Sons as a defendant related back to the original filing of Overlap's petition and, therefore, was filed within the applicable statutes of limitation.

Opinion by: James Edward Welsh, Judge

June 15, 2010

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